

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
August 24, 2001 Session

PAUL IVY

v.

**ALTON HESSON, WARDEN, TONY PARKER, ASSOCIATE WARDEN,
ROBERT HENRY, DEPUTY WARDEN, CAPTAIN MOORE, SGT. AARON
TITTLE, and CPL. MICHAEL OTTINGER, DISCIPLINARY BOARD
CHAIRMAN**

**An Appeal from the Circuit Court for Lauderdale County
No. 5231 Joseph H. Walker, Judge**

No. W2001-01332-COA-R3-CV - Filed May 29, 2002

This is a 42 U.S.C. § 1983 prisoner case. The plaintiff, a state prisoner, brought this § 1983 action in forma pauperis, claiming that his due process rights were violated because he was disciplined in retaliation for filing a letter of complaint to the appropriate authorities. The trial court dismissed the complaint without prejudice, determining that the plaintiff did not submit an affidavit that accurately documented his prior history of litigation as is required under Tennessee Code Annotated § 41-21-805. The plaintiff now appeals. We reverse, finding that the trial court erred in failing to allow the plaintiff limited discovery to rebut the defendants' evidence that his affidavit was incomplete.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Reversed

HOLLY K. LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Paul Ivy, appellant, pro se.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General, and Pamela S. Lorch, Nashville, Tennessee, for the appellees, Alton Hesson, Tony Parker, Robert Henry, Captain Moore, Aaron Tittle, and Michael Ottinger.

OPINION

This a 42 U.S.C. § 1983 prisoner case. Plaintiff/Appellant Paul Ivy (“Ivy”) is an inmate of the Tennessee Department of Correction, housed at West Tennessee State Penitentiary (WTSP) in Henning, Tennessee. On January 5, 1999, Ivy became involved in a confrontation with an employee of WTSP, Sergeant Aaron Tittle (“Tittle”). As a result of that confrontation, Ivy wrote a letter to the WTSP deputy warden Robert Henry (“Henry”), describing the confrontation from his perspective and asking the warden to prevent Tittle from further mistreating him. Ivy concluded his letter with the following:

I know that I can’t make it without the assistance of you in stopping this illegal and arbitrary action before it escalates to a level that leaves no winners and for this reason I truly hope that you take it upon yourself to stop this arbitrary action before it places me within a situation where I have [to] defend myself against a [sic] officer that truly has no legitimate reason to harrass [sic] and or attempt to injure me.

Based on this language, Ivy received a disciplinary conviction for threatening an employee.

On March 22, 1999, Ivy filed a lawsuit under 42 U.S.C. § 1983 in forma pauperis, asserting that he was disciplined in retaliation for writing the letter to Henry about Tittle’s alleged misbehavior. He named as defendants warden Alton Hesson, associate warden Tony Parker, deputy warden Robert Henry, deputy warden, Captain Moore, Aaron Tittle, and disciplinary board chairman Michael Ottinger. On April 14, 1999, Ivy filed an affidavit listing his previously filed lawsuits, pursuant to Tennessee Code Annotated § 41-21-805. That statute requires:

(a) Any inmate who files a claim with an affidavit of inability to pay costs shall file a separate affidavit with the following information:

(1) A complete list of every lawsuit or claim previously filed by the inmate, without regard to whether the inmate was incarcerated at the time any claim or action was filed; and

(2) For each claim or action listed in subsection (a):

- (A) The operative facts for which relief was sought;
- (B) The case name, case number and court in which the suit or claim was filed;
- (C) The legal theory on which the relief sought was based;
- (D) The identification of each party named in the action; and
- (E) The final result of the action, including dismissal as frivolous or malicious under this part or otherwise.

(b) If the affidavit filed under this section states that a previous suit was dismissed as frivolous or malicious, the affidavit must state the date of the final order affirming the dismissal.

(c) The affidavit must be accompanied by a current certified copy of the inmate's trust account statement.

Tenn. Code Ann. § 41-21-805 (1997). In his affidavit, Ivy specified a previously filed case listed as docket number 3-97-1083 in which he alleged deliberate indifference while he was in maximum custody at the prison. Ivy stated that the action had been dismissed as against some of the defendants, but that "[t]he rest are still pending."

On April 29, 1999, the defendants filed a motion for summary judgment, asserting that Ivy failed to submit accurate information about his prior lawsuits in violation of the statutory requirement. In support of that motion, the defendants submitted the affidavit of Tonya Thornhill, a record specialist for the Civil Rights and Claims Division of the Office of the Attorney General and Reporter. Thornhill stated in her affidavit that she maintains the tracking system in that division, and that Ivy had filed at least four other lawsuits not mentioned in his original affidavit, two pending and two that had been resolved. Thornhill did not specify case names or docket numbers relating to Ivy's other lawsuits.

On approximately May 1, 1999, Ivy wrote a letter to Thornhill asking her to provide him with information related to the lawsuits to which she referred in her affidavit. In a letter dated May 7, 1999, the assistant attorney general sent Ivy a letter indicating that Thornhill would not provide the requested information because "[i]t is your responsibility to come forth with evidence, if any, which you contend supports your position." Consequently, on May 12, 1999, Ivy filed a motion to compel the defendants to provide him with "a complete listing" of every lawsuit to which Thornhill referred, stating that, because he had been in eight different institutions during his incarceration, many of his personal records had been misplaced or destroyed. *See* Tenn. R. Civ. P. 37.01.

On May 28, 1999, Ivy filed a memorandum in opposition to the defendants' motion for summary judgment as well as a supporting affidavit. In Ivy's affidavit, he claimed that he had listed "at least three" pending lawsuits in his original affidavit, and that all three had been joined in the lawsuit with docket number 3-97-1083. Ivy asserted that he had no knowledge of the fourth lawsuit mentioned by Thornhill. Ivy asserted that he had "attempted to follow the guidelines of T.C.A. 41-21-805 to the best of [his] ability," and that he was seeking to obtain information from Thornhill so that he could properly defend his position.

On May 11, 2001, the trial court granted the defendants' motion for summary judgment and dismissed the complaint based on Ivy's failure to comply with Tennessee Code Annotated § 41-21-805. The trial court noted that the "dismissal is without prejudice to the right to file another lawsuit based upon the same cause of action." The trial court did not address Ivy's motion to compel. From this order, Ivy now appeals.

On appeal, Ivy argues that the trial court erred in granting summary judgment in favor of the defendants based on Thornhill's affidavit. In essence, he claims that Thornhill's affidavit was insufficient to show that he had not complied with the statute because Thornhill submitted no documentation to corroborate her assertion that Ivy had filed four previous lawsuits. He also argues that the trial court erred in refusing to compel the defendants to produce corroborating documentation, contending that not having that information prevented him from defending himself against Thornhill's assertions. Ivy also contends that the trial court erred in assessing court costs against him, because the lawsuit was filed in forma pauperis. The defendants respond that the trial court properly granted summary judgment in their favor, because Ivy bore the burden of obtaining and submitting the required information when he filed his claim. *See Williams v. Bell*, 37 S.W.3d 477, 479 (Tenn. Ct. App. 2000).

We review a grant of summary judgment de novo. *Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn. 1997). Summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Bradfield v. Dotson*, No. 02A01-9707-CV-00152, 1998 Tenn. App. LEXIS 117, at *4 (Tenn. Ct. App. Feb. 17, 1998); Tenn. R. Civ. P. 56.03. The moving party bears the burden of demonstrating that no genuine issue of material fact exists, taking the strongest legitimate view of the evidence in favor of the nonmoving party. *Dotson*, 1998 Tenn. App. LEXIS 117, at *5. "Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial." *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993), *quoted in Luther v. Compton*, C.A. 02A01-9710-CV-00253, 1998 Tenn. App. LEXIS 193, at *9 (Tenn. Ct. App. March 17, 1998). Summary judgment is only appropriate when the facts and legal conclusions permit only one result. *Dotson*, 1998 Tenn. App. LEXIS 117, at *5. A trial court's decision to limit discovery is reviewed for an abuse of discretion. *See Montague v. Kellum*, No. E2000-02732-COA-R3-CV, 2001 Tenn. App. LEXIS 356, at *14-*15 (Tenn. Ct. App. May 17, 2001)

The trial court held that Ivy failed to comply with Tennessee Code Annotated § 41-21-805 based on the information in Thornhill's affidavit. In her affidavit, Thornhill stated that "[t]his Division alone has . . . two open files on lawsuits brought by Paul Ivy . . . [and] has previously closed files on two additional lawsuits brought by Paul Ivy. " Ivy argues that the information provided by Thornhill is incomplete and is not, in and of itself, sufficient to prove that he did not file a complete affidavit as required under the statute. Ivy further argues that the trial court erred in failing to grant his motion to compel the defendants to produce documentation supporting Thornhill's affidavit. Without being able to obtain that information, Ivy argues, he was unable to defend himself against the claim that he had filed other cases not mentioned in his affidavit.

In considering the defendants' motion for summary judgment, the only issue before the trial court was whether Ivy had filed a complete affidavit in accordance with Tennessee Code Annotated § 41-21-805. The Thornhill affidavit constituted evidence to support the defendants' position that Ivy's affidavit was incomplete and his case should be dismissed. *See Williams*, 37 S.W.3d at 479 (dismissing prisoner claim based on incomplete affidavit). To defeat the defendants' motion, the

burden shifted to Ivy to “demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute” about the sufficiency of his affidavit. *Byrd*, 847 S.W.2d at 211. Though Ivy attempted to conduct limited discovery on this issue through his motion to compel, the trial court did not address the motion to compel and instead simply granted the defendants’ summary judgment motion.

Under these circumstances, we must conclude that the trial court abused its discretion in not permitting Ivy limited discovery to ascertain the accuracy of his affidavit under Tennessee Code Annotated § 41-21-805, the accuracy of Thornhill’s affidavit, and to rebut the defendants’ motion for summary judgment. We have held that “[a] prisoner pursuing a civil lawsuit may conduct discovery, but the discovery is subject to appropriate limitations imposed by the trial court.” *Dotson*, 1998 Tenn. App. LEXIS 117, at *7; *see Luther*, 1998 Tenn. App. LEXIS 193, at *10-*12. On remand, the trial court shall have broad discretion to determine the scope and manner of discovery. In limiting that discovery, the trial court must weigh the plaintiff’s interests with the institutional concerns of the correctional facility. *See Thompson v. Hammond*, 1999 Tenn. App. LEXIS 229, at *14-*15 (Tenn. Ct. App. Apr. 6, 1999). Thus, the trial court’s grant of summary judgment in favor of the defendants is reversed and the cause is remanded.

The decision of the trial court is reversed and the cause is remanded for further proceedings not inconsistent with this Opinion. Costs on appeal are to be taxed to the appellees, Alton Hesson, Tony Parker, Robert Henry, Captain Moore, Aaron Tittle, and Michael Ottinger, for which execution may issue if necessary.

HOLLY K. LILLARD, JUDGE